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No. 1178.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967.

EDWARD FRANZEN,

*Petitioner,*

v.

THE TOWNSHIP OF ELK, a municipal corporation of the State of New Jersey; THE TOWNSHIP OF UPPER PITTSGROVE, a municipal corporation of the State of New Jersey, PHILIP FRANZEN, EMIL W. GALLAGHER and NAOMI A. GALLAGHER, his wife; and JOHN FRANZEN.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey.

# BRIEF OF RESPONDENTS.

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## QUESTION PRESENTED.

Whether the taking of one co-owner's property by a municipality in an *in rem* foreclosure proceeding is a denial of due process for lack of proper notice when the notice given by the municipality was actually received by the other co-owner.

## STATEMENT OF THE CASE.

For purposes of Respondents' Brief, the facts as stated in Petitioner's Statement of the Case are substantially acceptable. However, we draw the Court's attention to the following additional facts, which are pertinent (references will be made to Petitioner's Appendix):

1. The custom relating to the taxing of real property located in more than one municipality was abolished by Act of the New Jersey Legislature in 1918 (C.-10a-27 to C.-11a-5).

2. Petitioner, Edward Franzen, and Respondent, Philip Franzen, were co-owners of the premises. Philip Franzen knew taxes were assessed against the land by Elk Township and that the property was sold at the tax sale in 1945. He testified that he received tax bills from Elk Township and when asked what happened to them, stated, "The mice got them and chewed them up." He also received a final notice of unpaid taxes but did not tell his brother, Edward, that he was not paying the taxes assessed (C.-16a-14-20).

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## ARGUMENT.

The plaintiff in this case contends that he has been denied due process by the taking of his property under an *in rem* foreclosure. The constitutionality of *in rem* foreclosure acts has been uniformly sustained on the ground that proceedings for the collection of taxes require no personal service of notice upon the owner once the taxes are duly assessed, as such owners are presumed to know that the land will be sold for nonpayment of taxes. *Winona and St.*

*Paul Land Co. v. Minnesota* (1895), 159 U. S. 526, 40 L. ed. 247, 16 S. Ct. 83; *Leigh v. Green* (1904), 193 U. S. 79, 48 L. ed. 623; *Ballard v. Hunter* (1907), 204 U. S. 241, 51 L. ed. 461; *Longyear v. Toolan* (1908), 209 U. S. 414, 52 L. ed. 859, 28 S. Ct. 506.

Respondents do not urge that the classification of an action as being *in rem* relieves them of a duty to observe fundamental requirements of due process. However, Respondents do urge that the purpose of notice is to provide interested persons with an opportunity to participate in the proceeding. The requirements of notice are basically to convey the required information with due regard for the practicalities and peculiarities of the individual situation. *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, 70 S. Ct. 652, 94 L. ed. 865. Elk Township assessed taxes, sent out tax bills and tax notices which were received by one co-owner.

The loss suffered by Petitioner was brought about by the silence of a faithless co-owner, and not by the failure of the municipality to exercise a reasonable effort to convey the required information.

The instant case, therefore, does not involve a question of sufficiently widespread scope of constitutional issues as to warrant certification. Petitioner argues that, because he did not receive personal notice, he has been denied due process. However, he does not meet Respondents' contention that they have satisfied the *Mullane* standard, in that reasonable efforts were made "to convey the required information with due regard for the practicalities and peculiarities of the individual situation."

The instant case is similar to *Nelson v. City of New York*, 352 U. S. 103 (1956), where the Court found that Petitioner was not entitled to relief when his own agent caused the lack of notice. In the *Nelson* case, Petitioner's accountant had disposed of the tax bills without making payment.

Whether thrown away or chewed up by mice, Petitioner cannot complain that the municipality, in its governmental capacity, has failed to act with propriety when the landowner's own agent is the cause of his distress.

As stated in the *Mullane* case, it is difficult to prescribe notice requirements, but as long as the purpose of notice is achieved, as in the instant case, where actual notice is received, the due process requirements are satisfied.

The New Jersey Tax Sale Law (N. J. S. 54:5-1 et seq.) proscribes notice requirements from the initial action of the municipality in conducting a tax sale to the final process of foreclosing the landowner's right of redemption. It has never been urged that these statutory requirements were not met and it has been established as a matter of fact that the purpose of the notice requirements was achieved when one of the co-owners became aware of the proceeding. Petitioner must know that a municipality in which he owns property will tax that property in order to raise revenue with which to perform its governmental function. He cannot claim a lack of due process with respect to notice requirements by the municipality while he is guilty of a failure to apprise himself of the impact on him of the governmental function of collection of taxes which he must know is being performed.

## CONCLUSION.

As to the Respondents, the Township of Elk and the Township of Upper Pittsgrove, the fundamental requirements of due process have been observed and Respondents respectfully pray that certiorari to the Supreme Court of the State of New Jersey be denied.

Respectfully submitted,

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